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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1980

MARION ODELL MORROW,

*Petitioner,*

VS.

STATE OF ARKANSAS,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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IN THE

# Supreme Court Of The United States

**OCTOBER TERM, 1980**

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STATE OF ARKANSAS,

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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### QUESTIONS PRESENTED FOR REVIEW

(1) Whether Defendant's due process rights were violated when defense counsel, in a Habitual Criminal trial, stipulated that Defendant had seven prior felony convictions, thus depriving the Defendant of any opportunity to challenge the use of these prior convictions in determining his sentence.

(2) Whether the identification procedure was so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

### PETITION FOR WRIT OF CERTIORARI

The Petitioner, the Appellant/Defendant below, prays that a Writ of Certiorari issue to review the February 2, 1981, opinion of the Supreme Court of Arkansas.

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## OPINION BELOW

On February 2, 1981 the Supreme Court of Arkansas entered an opinion, with a dissenting opinion by John I. Purtle, Associate Justice, *Morrow v. State,* —— Ark. ——, 610 SW2d 878, denied the appeal of the Petitioner. A copy of the Court's opinion is printed herein as Appendix "A".

## STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(1) The date of the judgment sought to be reviewed is February 2, 1981.

(2) The statutory provision conferring jurisdiction on this Court is 28 U.S.C. 1257(3).

## STATEMENT OF THE CASE

The Petitioner Morrow was arrested in Stillwell, Oklahoma, on May 11, 1979, shortly after a burglary and theft of property at a residence in Washington County, Arkansas. He was charged with these offenses, and further charged under the Arkansas habitual criminal statute (Ark. Stat. Anno. 41-1001 et seq.) by an Information dated May 14, 1979.

There was strong circumstantial evidence. Morrow was arrested while driving a car observed at the crime scene, and stolen property from the residence was in plain view in the vehicle. However, he offered a vigorous defense, suggesting alibi and that another individual committed the crime.

Mrs. Grace Johnson (a neighbor) was the only eyewitness to the crime. She was shown a photographic lineup shortly after the crime, but could not identify the Defendant. Later, a private investigator hired by the Defendant showed her photographs of him, but she could not make positive identification. Again, on Friday before the trial began on Monday, the Deputy Prosecuting Attorney asked her to identify Morrow from a photograph, but she could not. At the trial, she identified Morrow, but with some reservations.

The Trial Court admitted into evidence a crude sketch which Mrs. Johnson had made of the person who committed the crime. The drawing shows a subject (a) wearing a cap, and (b) with a pullover shirt with dark patches on the shoulders. The drawing almost certainly was made after Mrs. Johnson was shown a photograph of the Defendant

wearing such a shirt, that photograph having been made at the time of his arrest.

At trial, the photograph of the Defendant made at the time of his arrest was admitted without objection. However, the Defense objected to the admission of her "doodled" drawing, pleading that the exhibit was offered to give improper support to an identification that was already impermissibly unreliable.

The Arkansas habitual criminal statute, like those of many other states, calls for a bifurcated trial. After the jury returned a verdict of "guilty", they were to hear evidence concerning prior felony convictions. At this point, the Defendant's attorney stipulated that the Defendant had committed seven prior felonies. Copies of seven judgments were given to the jury as exhibits. These are abstracted as Appendix "C" to this Petition. Three of the convictions are without the assistance of counsel. In a fourth, assistance of counsel was waived. Two are dated the same date and appear to arise from a single episode. No testimony concerning the convictions was presented.

The jury found that Morrow had committed "two or three prior felonies", and sentenced him to 10 years on the burglary charge and to five years on the theft charge to run concurrently.

The judgment of the Circuit Court was timely appealed to the Supreme Court of Arkansas.

## TIME AT WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The two points presented in this petition have been timely presented in the Trial Court and the Supreme Court of Arkansas.

The question of improper identification was raised in the Trial Court by the objections of counsel, and was presented again on Appeal to the Supreme Court of Arkansas.

The question concerning stipulation as to prior felony convictions was presented on appeal to the Supreme Court of Arkansas.

## ARGUMENT

### CONCERNING STIPULATION AS TO PREVIOUS FELONY CONVICTIONS

The Eighth Circuit has previously spoken to this issue in *Cox v. Hutto*, 589 F.2d 394 (8th Cir. 1979) (Cox I) and *Cox v. Hutto*, 619 F.2d 731 (8th Cir. 1980) (Cox II). We ask this Court to grant Certiorari to announce a rule of general application. This is a matter of more than local interest, since many states have habitual criminal statutes similar to that of the State of Arkansas employed in this case.

We further submit that the better rule of law would be as follows:

> "When the State seeks to prove habitual criminal status by introducing copies of prior felony conviction judgments or penitentiary commitments, the Defendant must be accorded every opportunity to challenge or explain the circumstances of the conviction. The Court itself should exclude those which are found lacking, as for absence of assistance of Counsel. A stipulation as to prior felony conviction should be permitted only after the Court ascertains from the Defendant that he knowingly and voluntarily agrees to the stipulation." (Adapted from *Cox I* and *Cox II*, above.)

Nowhere in the record is there any indication that the appellant was asked by the trial court if he knowingly and voluntarily agreed to the stipulation. His counsel's stipulation amounted to a waiver of appellant's right to force the State to bear its burden of proving prior convictions, *McConahay v. State*, 257 Ark. 328, 516 SW2d 887 (1975) and of his right to rebut the State's evidence, Ark. Stat.

Ann. §43-2330.1(2) (Repl. 1977). A previous conviction must be proved beyond a reasonable doubt. *Leggins v. State*, 267 Ark. 293, 590 SW2d 22 (1979) and because of the penal nature of the habitual criminal statute, the State is accountable for perfect compliance with regard to the evidence presented to support the habitual charge. *Roach v. State*, 255 Ark. 773, 503 SW2d 467 (1973). Since all that remains in a habitual proceeding after a stipulation of prior convictions is the judgment and setting of punishment, the stipulation has been found to be the functional equivalent of a guilty plea. *Cox v. Hutto*, 589 F.2d 394 (8th Cir. 1979). This is presumptively prejudicial unless the State can show — absent the stipulation — it possessed at the time of the trial evidence proving the prior convictions essential to support appellant's sentence. *Cox, supra.* While the State had certified conviction records, they were defective for the reasons set out below. Also, the appellant was prejudiced by the stipulation by his inability to rebut the State's evidence on the convictions.

The record shows that appellant had an attorney in only three of the seven stipulated convictions. (T. 414, 415, 419) Of the four convictions where he did not have counsel, there was one case where the record recites that he waived the assistance of counsel. (T. 420) There were, then, three convictions where the record does not show appellant had the assistance of counsel or validly waived counsel. (T. 413, 416, 417) Convictions of this nature are not acceptable in applying the habitual criminal statute. *Klimas v. State*, 259 Ark. 301, 534 SW2d 202 (1976).

Overlooking appellant's objections regarding the stipulation, it could be said that throwing out the three uncounseled convictions would still leave four convictions,

and these would be ample to support the jury's habitual finding in this case. (T. 449, 450) This is what occurred upon remand to the district court in the *Cox* case, but the United States Court of Appeals for the Eighth Circuit affirmed the granting of habeas corpus relief on the theory that there was no way to speculate that the error in originally accepting the stipulation did not affect the jury's deliberation. *Cox v. Hutto*, 619 F.2d 731 (8th Cir. 1980).

In this case, although the jury only found appellant guilty of two or three previous felonies despite the stipulation, it cannot affirmatively be said the defective stipulation did not affect the jury's deliberation and did not deny appellant the opportunity to make his challenge before a jury to the use of the prior convictions. *Cox II, supra.*

The error in this situation was not harmless, in light of the peculiar action of the jury in finding appellant guilty of two or three prior convictions when it was looking at stipulated evidence of seven previous convictions. This particular result, when viewed in connection with the lengthy exchange between the court and jury (reproduced below), can lead to only one conclusion — the jury wanted to show some mercy or compassion in the sentencing.

If the jury found four or more convictions, the sentence range would be 20 to 40 years; by finding two or three priors, the range went to five to thirty years — and the sentence returned was at the lower end of that range — ten years on the burglary charge and five years on the theft of property conviction. Further, the jury specified concurrent sentences. Petitioner does not feel this Court can assume that the sentence would have been the same if the jury had been presented with evidence of only four convictions, under the circumstances.

To illustrate the jury's difficulty in applying the habitual criminal statute, we have reproduced as Appendix "D" part of the transcript setting out the dialogue between court and jury during their deliberations.

## CONCERNING IDENTIFICATION PROCEDURE

This Court, as well as the several Courts of Appeal, have made it clear that unnecessarily suggestive pretrial confrontation procedures, standing alone, do not violate due process, and that reliability is the linchpin in determining the admissibility of identification testimony. (E.g., *Manson v. Brathwaite,* 432 U.S. 98 (1977).

The Defendant contended at his trial that another person committed the burglary, and that he purchased the stolen property from that subject. While there was sufficient evidence to convict the Defendant of theft by receiving, a less serious offense, Mrs. Johnson's identification was critical in proving the crimes of burglary and theft, with which the Defendant was charged.

Mrs. Johnson said she saw a man place articles from her son's home into an automobile, and watched him drive away. She was shown a total of five photographs of the Defendant on three occasions from the day of the crime to shortly before the trial. From the photographs, she was unable to positively identify the appellant as the man she saw, yet at the trial she did, albeit with some hesitation.

This argument centers on the admission into evidence over objection, of a sketch she said she made, Exhibit "J"; particularly when viewed in connection with Exhibit "O", a photograph made of appellant on the day of the crime, which was admitted without objection. Reproductions of the two exhibits are included with this petition.

The appellant's objection to admission of the sketch was that it had not been established whether Mrs. Johnson drew it before or after she saw Exhibit "O". The prosecution's purpose in seeking admission of the sketch was to show the similarity between the dark stripes on the shoulders of the sketch and the dark stripes on the shirt the appellant was wearing when he was apprehended some thirty minutes after the crime, Exhibit "O".

Asked about the darker lines on the man's shoulders of her sketch, she first responded that she was just trying to figure out the colors; somehow she thought the man might have had on a red shirt and she put it there to see what it would look like.

Not satisfied with that response, the prosecutor continued:

Q. I notice that it looks like a line on each shoulder. Did you have any particular idea in mind when you drew that, ma'am?

A. I don't know why unless I thought he might have had a two-tone shirt or something.

Q. Pretty spontaneous drawing, then, isn't it? Is that what you are saying? You were just drawing it from thought?

A. Uh-huh.

The Court denied admission of the sketch on the appellant's previously mentioned objection.

The sketch was admitted during the examination of Officer Rexford, who testified that Mrs. Johnson told him she made the sketch. He said he had no personal knowledge

of whether she made it before or after he showed her Exhibit "O", and that the shoulders in the sketch bear a likeness to him (obviously a likeness to the shoulders in Exhibit "O", the photograph).

Petitioner contends the sketch was not relevant to any fact issue and was inadmissible. She said the man she saw in the courtroom, the appellant, was the man she saw at her son's house on the date of the crime. She did not testify that the man had on a shirt with a darker area at the shoulders. Therefore, the appearance of the shirt was not of any consequence in determining the innocence or guilt of the petitioner. The only purpose in introducing the sketch was to shore up the shakey process by which Mrs. Johnson ultimately identified the appellant.

We submit that the identification procedure in this case, viewed as a whole, was impermissibly suggestive, and resulted in unreliable identification which violated the Petitioner's due process rights.

## CONCLUSION

For the reasons submitted, it is respectfully urged that this Court should issue its Writ of Certiorari to the Supreme Court of Arkansas, and reverse the conviction of the Petitioner and remand for a new trial.

Respectfully submitted,

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# Appendix

## APPENDIX "A"

## SUPREME COURT OF ARKANSAS

No. CR 80-92

Opinion Delivered February 2, 1981

MARION ODELL MORROW ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM WASHINGTON CIRCUIT COURT, FIRST DIVISION, MAHLON GIBSON, JUDGE

AFFIRMED

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FRANK HOLT, *Associate Justice*

Appellant was convicted of burglary (Ark. Stat. Ann. §41-2002 [1] [Repl. 1977]), theft of property (Ark. Stat. Ann. §41-2203 [2] [b] [Repl. 1977]) and sentenced as a habitual criminal (Ark. Stat. Ann. §41-1001 [Repl. 1977]) to ten years and five years, respectively, the sentences to run concurrently as recommended by the jury.

Appellant first contends there was insufficient evidence of the current market value of the stolen items, which consisted of a television and a muzzle-loading rifle in a buckskin scabbard. The owner testified that he had purchased the television set for $442.85 at Sears about two years previous to the theft. He produced the receipt. His wife testified she had paid $23 for the gun case the previous summer. There was no evidence of the value of the rifle

nor the condition of any of the items at the time of the theft. Appellant overlooks the fact, however, that he testified on cross-examination that, in explanation of his possession of the items, he paid another person $115 for them. In the circumstances, the evidence is amply substantial that the property was in excess of the statutory requirement of $100. *Tillman v. State*, 271 Ark. ——, —— SW2d —— (December 22, 1980); *Bailey v. State*, 266 Ark. 260, 583 SW2d 62 (1979); and *Boone v. State*, 264 Ark. 169, 568 SW2d 229 (1978).

We next consider appellant's assertion that error occurred in the admission into evidence of a sketch made of the man by a witness who observed him taking the items from the victims' home. The sketch reflected how tall she thought the burglar was, the thickness of his hair and the lines on his shoulder garment. She thought he might have been wearing a "two-tone shirt or something." A photograph of appellant, introduced into evidence and taken shortly after his arrest, showed appellant wearing a similar shirt. Appellant argues that the sketch was not relevant to any fact issue and, therefore, inadmissible under Ark. Stat. Ann. §28-1001, Rules 401 and 402 (Repl. 1979).

Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *McGuire v. State*, 265 Ark. 621, 580 SW2d 198 (1979); and Rule 401, *supra*. In our view the sketch certainly tends to make it more probable than less probable that appellant was properly identified as having committed the alleged offense.

We now consider appellant's contention that prejudicial error was committed during the sentencing phase of

the trial when appellant's attorney and the prosecutor were permitted to stipulate to the existence of seven prior convictions without appellant being questioned as to whether he understood and agreed to the stipulation. The record shows the stipulation was made in a discussion at the bench. Although appellant's counsel stated to the court that he had consulted with the defendant, who agreed to the stipulation, no inquiry was made of the appellant by the court as to his acquiescence or that he understood the previous convictions could be used to enhance his sentence. Appellant cites *Cox v. Hutto,* 589 F.2d 394 (8th Cir. 1979) (Cox I), which holds that such a stipulation is a denial of due process of law, because it amounts to a waiver of a defendant's constitutional right to have the state prove the prior offenses and his right to rebut that proof under Ark. Stat. Ann. §43-2330.1(2) (Repl. 1977) and Ark. Stat. Ann. §41-1005(2) (Repl. 1977); such a stipulation is the equivalent of a guilty plea and, therefore, the trial court is required to question a defendant to determine if he knowingly and voluntarily agreed to the stipulation; and it is "constitutional error" not to do so. See also *Cox v. Hutto,* 619 F.2d 731 (8th Cir. 1980) (Cox II); and *McConahay v. State,* 257 Ark. 328, 516 SW2d 887 (1975).

Thus, the question is whether or not the asserted error mandates reversal of this case; that is, whether the verdict at sentencing can be supported by valid convictions, authenticated copies of which were presented to the jury, and whether we can say appellant did not suffer prejudice. See *Cox v. Hutto, supra* (Cox II). Here, three of the seven convictions did not show that appellant had the benefit of counsel or made a valid waiver. Therefore, these convictions admittedly cannot be used to support the enhanced

sentence. *McConahay v. State, supra.* This leaves four prior convictions which could support the sentences, argues the state, since the jury found two or three prior convictions. Appellant argues that it cannot affirmatively be said without speculation that the stipulation did not affect the jury's deliberation and that the stipulation denied him the opportunity to challenge, before the jury, the use of the prior convictions, which runs afoul of *Cox v. Hutto, supra* (Cox II).

However, in our view, the *Cox* cases are not controlling in the case at bar. There, four previous convictions were stipulated and read to the jury; it found him guilty of four previous convictions which subjected him to a maximum sentence enhancement of 31½ years and the jury so imposed. Here, the seven prior sentences were stipulated, introduced as evidence and given to the jury which found appellant guilty of only two or three of the seven stipulated prior felonies. It imposed only ten of a possible thirty years for burglary and five of a possible fifteen years for theft of property under our enhancement statute. The record shows appellant had an attorney in three of the seven stipulated convictions and waived assistance of counsel in another. Furthermore, appellant, during cross-examination by the prosecutor, had admitted to the jury two previous convictions and did not deny a third.

In the circumstances, we are of the view that the jury's verdict, absent the stipulation, is supported by sufficient valid convictions, and the state adequately met its required burden of showing appellant suffered no prejudice as a result of this stipulation.

Affirmed.

Purtle, J., dissents.

Dissenting Opinion of JOHN I. PURTLE, Associate Justice

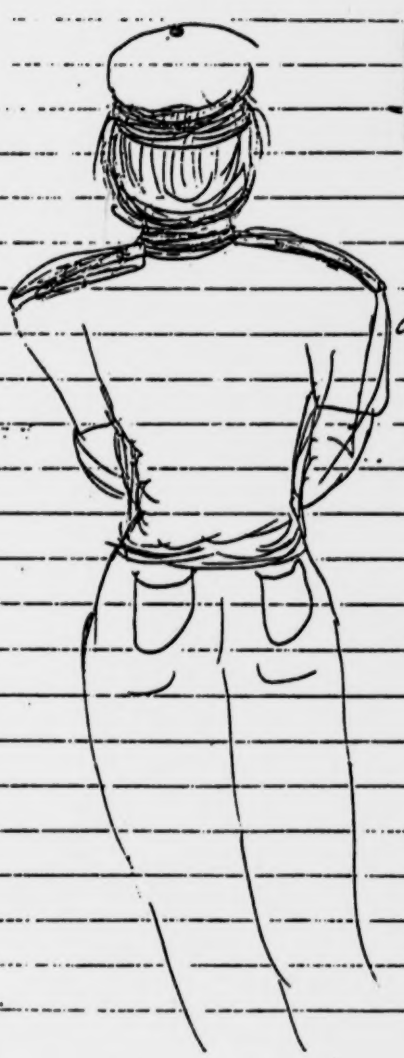
I respectfully dissent from the majority opinion in holding that the stipulation of seven convictions was properly presented to the jury. We do not allow a stipulation by an accused that he is guilty. We require proof to the court that the person is guilty and that he fully understands the rights he is giving up in pleading guilty. As was held in *Cox v. Hutto,* 589 F.2d 394 (8th Cir. 1979), the stipulation of prior convictions was the functional equivalent of a guilty plea. Therefore, it reasons that we cannot accept such stipulation without further proof and without the knowledgeable consent of the appellant.

It is obvious that the jury was concerned about the stipulation of the seven felonies by inquiring of the court whether such stipulation automatically set the number of convictions at four or more. I think the jury was entitled to know more about these convictions; of course, at least three of them could not have been presented to the jury had there been required of the state the proper degree of proof. The number of prior convictions is a factual determination to be made by the jury. Although we have previously reduced the sentence to the minimum allowed for the conviction, such would be improper in this case. *Klimas v. State,* 271 Ark. —— (December 22, 1980). The state has the same burden of proof in the matter of prior convictions as it does on the case in chief. *McConahay v. State,* 257 Ark. 328, 516 SW2d 887 (1974); and *Leggins v. State,* 267 Ark. —— (December 3, 1979).

There is no way that I know of by which it can be determined how much reliance the jury placed on the stipulation in reaching the sentences imposed. Obviously,

they gave more than the minimum and they did find the appellant had committed two or more previous offenses. Although I seriously doubt the appellant will fare as well on a retrial, I am of the opinion he has the right to a retrial because the stipulation on the seven prior convictions was prejudicial.

## APPENDIX "B"




5'10" or 11"
about 160 lbs
Black hair
Thick hair

over

## APPENDIX "C"

## ABSTRACT OF JUDGMENTS

I Ronald D. Dobbs, hereby certify that the attached are copies of the original penal institution records of Marion Odell Morrow, ADC No. 58429.

Dated: May 21, 1979.

Signed: Ronald D. Dobbs, Warden. (T. 409)

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-A
(T. 413)

Marion Odell Morrow was indicted for burglary and grand larceny in the Crawford Circuit Court. On March 17, 1970, Marion Odell Morrow, appearing without counsel entered a plea of guilty as charged and the court set his punishment at five years for burglary and one year for grand larceny with the sentences to run concurrently.

Signed: Glen Wisely, Circuit Court Clerk.

Dated: March 17, 1970.

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-B
(T. 414)

Marion Odell Morrow was indicted for escape in Pulaski Circuit Court. Marion Odell Morrow, appearing with his appointed attorney, L. W. Rosteck, entered a plea of guilty to the escape charge on July 6, 1970, and was sentenced to one year in prison.

Signed: Roger McNair, Circuit Court Clerk.

Dated: July 6, 1970.

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-C
(T. 415)

Marion Odell Morrow was indicted for burglary in Crawford Circuit Court. On February 23, 1967, through his attorney Lonnie Batchelor, Mr. Morrow entered a plea of guilty and his punishment was set at five years in the penitentiary with three years suspended.

Signed: Glen Wisley, Circuit Court Clerk.

Dated: February 23, 1967.

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-D
(T. 416)

Marion Odell Morrow was charged by information with escape in the Jefferson County Circuit Court. On July 13, 1967, Mr. Morrow, without counsel, entered a plea of guilty to a charge of escape and his punishment was set at three years in the state penitentiary, his time to commence when the parole board determines that he is entitled to parole on No. 35823. This charge is No. 35601.

Signed: O. W. "Pete" Long, Circuit Court Clerk.

Dated: July 13, 1967.

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-E
(T. 417)

Marion Odell Morrow was charged by information with escape in the Jefferson County Circuit Court. Mr. Morrow, appearing without counsel, entered a plea of guilty as

charged and the court assessed his punishment at two years in the state penitentiary, his time to commence when the parole board determines he is entitled to parole on prior sentence. This was charge No. 35823.

Signed: O. W. "Pete" Long, Circuit Court Clerk.

Dated: July 13, 1967.

JUDGMENT AND COMMITMENT
STATE'S EXHIBIT 2
(T. 419)

Marion Odell Morrow was charged in United States District Court, Northern District of Oklahoma, with violating 18, U.S.C., Sec. 2312, in that he transported in interstate commerce from Tulsa, Oklahoma to Fort Smith, Arkansas, a stolen 1955 Chevrolet. Mr. Morrow, appearing with attorney Robert G. Brown, entered a plea of guilty and was sentenced to five years in prison.

Signed: Allen E. Barrow, United States District Judge.

Dated: November 19, 1974.

EXEMPLIFICATION CERTIFICATE
STATE'S EXHIBIT 3
(T. 420)

I, Pat L. Graham, Jr., Clerk of the United States District Court for the Western District of Arkansas, hereby certify that the documents attached hereto are true copies of the judgment and commitment entered September 3, 1965, in criminal number 6081, Fort Smith Division, entitled United States of America v. Marion Odell Morrow.

Signed: Pat L. Graham, Jr., Clerk.

Dated: May 17, 1979.

JUDGMENT AND COMMITMENT

Marion Odell Morrow, appearing without counsel, appeared before United States District Judge John E. Miller, waived the right to assistance of counsel, entered a plea of guilty to a charge of violation 18 U.S.C., Sec. 2312, in that he transported in interstate commerce from Oklahoma City, Oklahoma to a point near Prairie Grove, Arkansas, a stolen 1955 Oldsmobile. Mr. Morrow entered a plea of guilty on September 3, 1965, and was sentenced to imprisonment for a period of 18 months.

Signed: John E. Miller, United States District Judge.

Dated: September 3, 1965.

THE COURT:

We, of course — they will be given to the jury for their consideration. Do you want me to give your stipulation to the jury?

MR. HEUER:

I would like to present them to the jury.

THE COURT:

Present stipulation, as it has been made to the court, and stipulate that it has been certified. They are certified copies of records reflecting seven previous felony convictions, and what the convictions are if you want to go into that.

MR. HEUER:

Thank you, Judge.

THE COURT:

Is that agreeable, Mr. Jones?

MR. JONES:

Yes, Your Honor.

(Above statements made at the bench, outside the hearing of the jurors.)

## APPENDIX "D"

PORTION OF TRANSCRIPT

THE COURT:

Ladies and gentlemen of the jury, have you reached a verdict?

DAVID ROSE (The Foreman):

No, sir, we haven't.

THE COURT:

How do you stand as to numbers, and numbers only?

DAVID ROSE:

We have five (5), five (5) and two (2) undecided.

THE COURT:

You have been out about an hour and forty minutes. Do you seem to be making progress?

DAVID ROSE:

No, sir.

THE COURT:

Do you think there's a possibility you can make any progress? Do you want to back off and take another look?

DAVID ROSE:

I don't think so. (Several jurors shake (T. 443) their heads negatively.)

THE COURT:

I have got twenty minutes after three. Go back and try

another fifteen minutes. I will call you in and we will see where we are.

(The jury retires again to deliberate. As they leave the courtroom the following comments are made.)

A JUROR:

Can it be a simple majority?

THE COURT:

No, it must be unanimous.

DAVID ROSE:

Your Honor, can you tell us if he it still on parole?

THE COURT:

I can't tell you.

DAVID ROSE:

You can't?

THE COURT:

I cannot comment.

(The jurors retire once again and after deliberation, are called back into the courtroom.)

THE COURT:

Ladies and gentlemen of the jury, have you been able to reach a verdict?

DAVID ROSE:

We have not, Your Honor.

THE COURT:

How are you divided as to numbers only now? (T. 444)

DAVID ROSE:

Nine (9) and three (3).

THE COURT:

Do you think you are making any progress?

DAVID ROSE:

Right. Well, three (3) people who were very firm in their feelings to start with have not changed.

THE COURT:

Now, you twelve (12) people have been in the jury room, deliberating and, of course, I have not. Do you feel that you are making any progress? Is there any hope of reaching a verdict in this case?

A JUROR:

Can just any one of us answer?

THE COURT:

Yes. I don't want it as to how any individual feels about it, but do you feel there's any possibility of reaching a unanimous verdict?

A JUROR:

No, I don't because I think people are going to have to vote against their conscience, and we've got two (2) different groups and honestly don't think we can. I think we went as far as we could go.

THE COURT:

How do some of the rest of you feel?

JANITA MOORE (A Juror):

I agree. (T. 445)

THE COURT:

How —. Well, someone is going to have to make a determination in this matter, and I feel that you all are better qualified and as intelligent people as any will ever be. If you think there's any possibility at all in reaching a verdict, I would like for you to deliberate. If you think it is just absolutely impossible, well, that is a matter I will take into consideration. How do you feel about it? Mr. Foreman, let me ask you this: Do you feel it is possible for the jury to reach a verdict as to the level? In other words, one felony or two or three felonies, four felonies? If you can't reach a verdict on the punishment, are you able to agree on the level?

DAVID ROSE:

Yes, we are.

THE COURT:

I take it you have reached that agreement already?

DAVID ROSE:

Yes.

THE COURT:

I have five minutes after four. I don't want to belabor the point unnecessarily. I am going to send you back with this admonition — if at all possible, if you think it is possible, try (T. 446) to reach a verdict. If you simply cannot, and if it becomes just physically and mentally impossible that you cannot agree on punishment and if you can agree

on the level, agree on that and we will — return it back to the Court.

DAVID ROSE:

We have a level, Your Honor, we do.

WILLIAM LAMKINS:

May I ask a question? The fact that the seven (7) felonies were stipulated by both the prosecution and defendant does that automatically set it on four (4) or more?

THE COURT:

I can't directly comment on that. I simply can only point out that you heard the evidence, you heard the stipulation. I'll just have to leave it at that, but I am going to send you back to the jury room. If you think you can agree on it in total, do that. If you are unable to agree, agree on the level and sign the verdict on that basis. Return it to the Court. I'll give you another fifteen minutes and I'll call you back again.

A JUROR:

By "level" do you mean the number of counts of felonies? (T. 447)

THE COURT:

Yes. If you can reach that — if you can do the entire thing, that would be better but I don't want to put you in a hopeless situation.

WILLIAM LAMKINS:

Let me ask one more question. The level we are talking about are the previous convictions, the seven (7) felonies, stipulated?

THE COURT:

In your verdict there are three (3) possible levels. If you found only one (1) prior felony, or two (2) or three (3), or four (4) or more.

WILLIAM LAMKINS:

We are not bound by the stipulation that there are seven (7) previous felonies?

THE COURT:

That I cannot comment on. Do you think you can agree on that? All right, I'm going to send you back. I'll call you back at twenty after four unless you signal me earlier. Any objections, gentlemen? Mr. Jones?

(Mr. Jones shakes his head negatively.)

THE COURT:

Mr. Heuer, you've no objections or additions?

MR. HEUER:

No, Your Honor.

THE COURT:

You've no objections, Mr. Jones? (T. 448)

MR. JONES:

Pardon?

THE COURT:

You've no objections to my instructions to the jury at this point?

MR. JONES:

No, Your Honor.

(Upon call of the Court, the jurors return to the courtroom.)

THE COURT:

Ladies and gentlemen of the jury, have you been able to reach a verdict?

DAVID ROSE:

We have, Your Honor.

THE COURT:

Would you hand them to me, please? Is this your verdict as to Burglary — "We, the jury, find defendant Marion Odell Morrow has been found guilty of either two or three previous felonies and fix his sentence at a term in the Arkansas Department of Correction of 10 years", and signed David C. Rose, Foreman? Is that your verdict? Is that a unanimous verdict?

DAVID ROSE:

Yes, it was.

THE COURT:

All right. Is this your verdict — "We, the jury, find Marion Odell Morrow has been convicted or found guilty of either two or three previous (T. 449) felonies and fix his sentence at a term of 5 years in the Arkansas Department of Correction, signed David C. Rose, Foreman". Is that your verdict, Mr. Rose?

DAVID C. ROSE:

Yes.

THE COURT:

Is that unanimous?

DAVID C. ROSE:

Yes.

THE COURT:

Do you want the jury polled?

MR. JONES:

No, Your Honor.

THE COURT:

Ladies and gentlemen, thank you very much.

WILLIAM LAMKINS:

I didn't hear anything about running concurrent.

THE COURT:

Oh, it is recommended by the jury that the sentences run concurrent. This is something I will consider. I am not bound by it but I will take it into consideration in imposing sentence. You are excused. (T. 450)